Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
800 Data Base Access Tariffs and the 800 Service Management System Tariff and	)	CC Docket No. 93-129
	)	
	)	
Provision of 800 Services	)	CC Docket No. 86-10

AT&T OPPOSITION

Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, AT&T Corp. ("AT&T") submits this opposition to the Application for Review of the Bureau's Refund Order[1] filed by U S WEST Communications, Inc. ("U S WEST") in this proceeding. U S WEST has failed to demonstrate that the Bureau erred in not allowing U S WEST to reduce its refund liability incurred under the Refund Order by amounts that U S WEST had previously refunded by means of application of the Commission's sharing mechanism.

In 1993, the Commission required all local exchange carriers ("LECs") to file tariffs to govern their offering of access service using the LEC 800 data base

[1] In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket Nos. 93-129 and 86-10, Memorandum Opinion and Order, released June 26, 1997 ("Refund Order").

system.[2] In response, the price cap LECs filed their 800 data base tariffs which included, in their Price Cap Indices ("PCI") calculations, exogenous costs allegedly associated with the 800 data base system. The Bureau suspended the LECs' tariffs for one day, imposed an accounting order and instituted an investigation to determine, among other things, whether the price cap LECs' 800 data base rates are reasonable.[3]

In its Report and Order the Commission disallowed certain exogenous costs which it found not to have been incurred specifically for the implementation of basic 800 data base service.[4] Accordingly, the Commission ordered the

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[2] See Provision of Access 800 Service, CC Docket No. 86-10, Notice of Proposed Rule Making, 102 F.C.C.2d 1387 (1986); Supplemental Notice of Proposed Rule Making, 3 FCC Rcd 721 (1988); Report and Order, 4 FCC Rcd 2824 (1989); Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rule Making, 6 FCC Rcd 5412 (1991); Second Report and Order, 8 FCC Rcd 907 (1993); Memorandum Opinion and Order on Further Reconsideration, 8 FCC Rcd 1038 (1993); Order, 8 FCC Rcd 1844 (1993); Memorandum Opinion and Order on Reconsideration, FCC 95-487 (December 7, 1995).

[3] See The Bell Operating Companies' Tariff for the 800 Service Management System, Tariff F.C.C. No. 1 and 800 Data Base Access Tariffs, Order, 8 FCC Rcd 3242 (1993); 800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order Designating Issues for Investigation, 8 FCC Rcd 5132 (1993).

[4] In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System tariff and Provision of 800 Services, Report and Order, 11 FCC Rcd 15227 (1996) ("Report and Order").

price cap LECs to adjust their PCIs downward by an aggregate $34.1 million,[5] on a prospective basis, to reflect the disallowances of their overstated exogenous costs.[6]

In the Reconsideration Order, the Commission determined that refunds are appropriate and required the incumbent LECs with disallowed exogenous costs to file a schedule of proposed refunds.[7] In the subsequently issued Refund Order, the Bureau specifically rejected U S WEST's, as well as the other LECs', arguments that they be permitted to offset their refund liability to reflect sharing amounts that they had already refunded to customers in 1993 and 1996, and ordered U S WEST and all other impacted LECs to refund the amount of overcharges without offset in the form of a one-time exogenous PCI adjustment.[8]

U S WEST claims (at 5-10) that it should be allowed to apply the amount of its sharing in 1993 and 1996 to offset its refund liability; otherwise, according to U S WEST, it would be required to refund revenues a second

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[5] See Report and Order, Appendix D.

[6] See Report and Order, paras. 307-15.

[7] In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Service, CC Docket Nos. 93-129 and 86-10, para. 21, released April 14, 1997 ("Reconsideration Order").

[8] Refund Order, para. 17.

time.[9] U S WEST claims (at 6-8) that the Bureau's reliance on FPC v. Tennessee Gas Co.[10] to deny this offset represents misapplication of that case, and that the Bureau's decision is inconsistent with the prior Commission and Bureau Orders in this proceeding and the Communications Act.

The Bureau did not err in its decision that U S WEST and other LECs were not entitled to offset their refund obligations with amounts refunded via sharing, either as a matter of law or policy. The record in this proceeding amply demonstrates that a LEC's sharing obligation does not mean that a LEC subject to that obligation has made a refund to its customers for any overstated PCI.[11] To the contrary, because the price cap plan stresses LEC overall

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[9] U S WEST contends (at 3, 5) that because it was subject to 50% sharing in 1993 and 100% sharing in 1996, it should be permitted to reduce its refund liability by half of the 1993 amount, $209,177, and all of the 1996 amount, $5,373,557.

[10] 371 U.S. 145 (1962).

[11] See In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket Nos. 93-129 and 86-10, AT&T Comments at 6-7, filed June 3, 1997 ("AT&T Comments"). The Bureau also recently noted that "there is no guarantee that those customers that benefitted from the from the [sharing] misallocation would be the same ratepayers paying the proposed offset because of the constantly changing market place." 1993 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 93-193, Phase I, Part 2, para. 18, released June 25, 1997.

productivity, the sharing obligation is measured by total interstate earnings and thus can be triggered even if the LEC does not exceed its PCIs for any of the measured services.[12]

The one-time PCI adjustment thus has no direct nexus with any refunds required under the LECs' sharing obligations, because a sharing obligation can arise regardless of whether a customer has been overcharged. Moreover, the record reflects -- and U S WEST does not dispute here -- that the provision of 800 data base services is only a portion of the total interstate earnings. Therefore, to the extent that a sharing obligation was triggered for U S WEST, the direct link to its 800 data base revenues is tenuous at best. In fact, U S WEST did not demonstrate in either its refund plan or the instant application that any sharing obligation resulted from its 800 data base rates or any particular rate element.

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[12] See Policy and Rules Concerning Rates for Dominant Carriers, Order on Reconsideration, 6 FCC Rcd 2637, 2679 (1991). MCI also noted that there is a clear distinction between refunds and sharing. Refunds reflect actual overcharges paid by customers for one or several rate elements, while sharing is based on overall earnings. In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket Nos. 93-129 and 86-10, MCI Comments at 5, filed June 3, 1997.

The Bureau's reliance on FPC v. Tennessee Gas Co., supra, to support its denial of an offset to the PCI adjustment, is entirely proper. The Bureau correctly concluded that that case supported its result because in that case, as here, the party that filed the excessive rates "shoulder[ed] the hazards incident to its action including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."[13]

U S WEST contends (at 8) that the principle of FPC v. Tennessee Gas Co. is that "a utility may not recoup undercharges to one set of customers by overcharging another group of customers," and thus appears to argue that because both the sharing obligation and the PCI adjustment apply to the same customer base, this case is inapplicable.[14] This is a vast oversimplification of the Supreme Court's ruling.

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[13] 371 U.S. at 152-53.

[14] U S WEST apparently relies on dictum in the Supreme Court decision which provides, by way of example, that if the Commission finds a rate for one class or zone of customers to be too low, the company cannot

> recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rates is ordered, the company must make refunds to them.

Id. at 152-53.

In FPC v. Tennessee Gas Co., the Supreme Court held that the Federal Power Commission acted appropriately within its powers when it ordered an overall rate refund to reflect a lower prescribed rate of return for the gas company, notwithstanding the high probability of subsequent refunds on those same rates to the extent that the Commission determined in further hearings the appropriate cost allocation among the services subject to such rates.[15] Contrary to U S WEST's restrictive interpretation, the Supreme Court plainly held that a "company is . . . required to refund any sums thereafter collected should it not sustain its burden of proving the reasonableness of an increased rate."[16] Indeed, the Supreme Court sustained the Commission's authority to order both overall refunds (that is, to all customers in all classes and zones) based on its lower rate of return prescription, and to issue a refund order resulting from its cost allocation proceeding -- an order that would likely prompt refunds to some of the very same customers that obtained refunds under the rate of return prescription.[17] U S WEST's attempt to read into that

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[15] Id. at 150-54.

[16] Id. at 152 (emphasis supplied).

[17] As the Court clearly acknowledged, there was the possibility that the subject gas company "may suffer

(footnote continued on following page)

case a limitation on refunds affecting the same rates only when such refunds affect a different set of customers thus finds no support whatsoever in that decision.[18]

U S WEST's further claim (at 9-10) -- that the Refund Order is "inconsistent" with the purposes of Section 204 because, by virtue of the 42 month delay in deciding the rate investigation, it puts the carrier in a worse position than had the investigation been timely resolved -- is similarly not a valid basis for review. As demonstrated above, the Bureau had an adequate record on which to base its finding that U S WEST was not entitled to an offset to

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(footnote continued from previous page)

further loss" should the Commission find that rate of return was excessive. Id. at 152-53.

[18] U S WEST also argues (at 8-9) that the Refund Order is inconsistent with the Report and Order and Reconsideration Order. It appears that U S WEST is claiming that, because the Bureau allowed a headroom offset to U S WEST's refund liability, it is entitled to both a headroom offset and a sharing offset for the same year. U S WEST has failed to demonstrate that the Bureau erred in denying the sharing offset on this basis. To the contrary, as AT&T pointed out in its Comments (at 6 n.19), if U S WEST is entitled to one offset, it cannot logically be entitled to the other. The headroom offset is based on U S WEST not overcharging its customers, because it priced its service below the Price Cap Index. The offset thus represents the amount U S WEST did not charge and collect from its customers. The sharing obligation, on the other hand, arises from actual overearnings based on the amounts actually charged and collected from customers. Because the sharing obligation arises from actual overearnings, the Bureau's Refund Order properly denied an offset for sharing.

its refund obligation, because the sharing mechanism and the subsequently ordered PCI adjustment address different overearnings concerns and are not directly related.[19] Thus, any delay in determining the refund obligation relating to the 800 database exogenous costs has no direct -- or even measurable -- impact on U S WEST's PCI adjustment.

Finally, and in an apparent acknowledgment that there is no legal basis for challenging the Bureau's decision, U S WEST argues (at 10-13) that it was prejudiced by the Commission's failure to act in this proceeding in a more expeditious manner. The record in this proceeding, on which the Bureau relied, demonstrates that the LECs' sharing obligation and refund obligation arise under separate and distinct mechanisms -- mechanisms which are not mutually exclusive even when applied concurrently.[20] U S WEST has offered no argument or evidence to show that the Bureau's

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[19] As AT&T demonstrated in its Comments (at 7 n.21), sharing meets two purposes. First, it serves as a backstop to the price cap plan by ensuring "that LEC price cap rates remain[] reasonable in the event that X-Factor was in error for the industry as a whole or . . . for individual LECs." Price Cap Performance Review for Local Exchange Carriers, First Report and Order, 10 FCC Rcd 8961, 9045 (1995). If the X-factor is set too high or too low, the backstop sharing mechanism helps adjust the PCI to correct the error and helps keep the LECs' rates within a range of reasonableness. Id. Second, sharing allows LECs to earn more than under rate of return if they operate their business more efficiently.

[20] See AT&T Comments at 6 n.19.

consideration of those two actions would have resulted in a different result if a decision had been released sooner. Thus the current circumstance is distinguishable from the cases cited by U S WEST -- each of which turns on the measurable adverse impact that agency delay caused to the affected party.[21]

WHEREAS, for the reasons stated above, AT&T respectfully requests that the Commission deny U S WEST's Application for Review in its entirety.

Respectfully submitted,

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[21] See, e.g., Kelly v. Secretary, U.S. Dept. Of Housing, 97 F.3d 118 (6th Cir. 1996) (the government's neglect caused the respondent to incur a greater liability-- which was reduced by the Court); Baumgardner v. Secretary, HUD on Behalf of Holley, 960 F.2d 572 (6th Cir. 1992) (due to the government's inaction, Baumgardner was deprived of an opportunity to settle promptly, which led the Court to find that the amount of damage imposed on Baumgardner was unfair and unreasonable).

CERTIFICATE OF SERVICE

I, Rena Martens, do hereby certify that on this 12th day of August, 1997, a copy of the foregoing "AT&T Opposition" was served by U.S. first class mail, postage prepaid, to the parties listed on the attached Service List.

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